INDEX

	Page
Opinion below	2
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	4
Reasons for granting the writ	7
Conclusion	12

CITATIONS

Cases:

Brassert v. *Biddle*, 148 F. 2d 134	11
Fotie v. *United States*, 137 F. 2d 831	9, 10
United States v. *Martinez*, 73 F. Supp. 403	10
United States v. *Wong Kim Ark*, 169 U. S. 649	11
Weedin v. *Chin Bow*, 274 U. S. 657	11

Statutes:

Criminal Code, Sec. 79	9
Nationality Act of 1940 as amended (54 Stat. 1137, 60 Stat. 721, 8 U.S.C. 501, 601, 746):	
Sec. 101	11
Sec. 201	11
Sec. 346	3, 7, 8, 9
Title 18, U.S.C., Section 911, 1948 revision	3

Miscellaneous:

Webster's New International Dictionary (2d ed., unabridged, 1948)	9

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 213

UNITED STATES OF AMERICA, PETITIONER

v.

ALLEN SMILEY

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

On June 9, 1950, respondent Smiley filed a petition for a writ of certiorari (No. 124) seeking review of the judgment of the Court of Appeals for the Ninth Circuit in so far as it affirmed his conviction on one of three counts charging that he falsely represented himself to be a United States citizen, in violation of Section 346(a) (18) of the Nationality Act of 1940. A brief in opposition to Smiley's petition has been filed by the Government.

The Solicitor General, on behalf of the United States, prays that in the event, but only in the event,

the petition for a writ of certiorari in No. 124 is granted, the Court also issue a writ of certiorari to review the judgment below in so far as it reversed Smiley's conviction on the remaining two counts. The certified transcript of record filed in No. 124 includes those portions of the record upon which this cross-petition is based.

OPINION BELOW

The opinion of the Court of Appeals (R. 288-295) is reported at 181 F. 2d 505.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1950 (R. 296). Smiley's petition for rehearing was denied on May 11, 1950, and the Government's petition for rehearing was denied on May 22, 1950 (R. 297). On June 20, 1950, the time within which to file this cross-petition for a writ of certiorari was extended by Mr. Justice Black to and including July 21, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether (a) an alien's answer "American" to a question as to his "Nationality" on a booking form filled out after his arrest as a material witness to a murder and (b) his affirmative answer to the question whether he was a "citizen" on a form signed while he was being booked on a gambling

charge, both of which answers were accompanied by statements to the effect that he was born in this country and had lived here all his life, constituted false representations that he was a United States citizen within the meaning of Section 346(a)(18) of the Nationality Act of 1940.

STATUTE INVOLVED

Section 346 of the Nationality Act of 1940 (54 Stat. 1137, 1163, 8 U. S. C. 746) provided in pertinent part at the time of the offenses involved here:

> Sec. 346. (a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—
>
> * * * * *
>
> (18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.[1]
>
> * * * * *
>
> (d) Any person violating any provision of subsection (a) of this section shall be fined not more than $5,000, or imprisoned not more than five years, or both.
>
> * * * * *

[1] This provision is now embodied in Section 911 of the 1948 revision of Title 18, U.S.C.: "Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both."

STATEMENT

Counts 1 and 3 of a four-count indictment (No. 20069) and another indictment in one count (No. 20604) filed in the United States District Court for the Southern District of California charged Smiley, an alien born in Russia (R. 208-209), with knowingly, wilfully, falsely, and fraudulently representing himself to be a United States citizen to Thomas A. Cox, an employee of the Beverly Hills Police Department on June 21, 1947, to J. E. Siu, a Los Angeles County Deputy Sheriff on May 25, 1944, and to the Los Angeles City Police Department on November 1, 1945, each allegedly having a good reason to inquire as to petitioner's nationality (R. 2-3, 11).[2] Smiley was convicted on each of these charges after a jury trial (R. 247-248), and he was sentenced to one year's imprisonment and fined $1,000 on each count, the imprisonment terms to run concurrently (R. 38-41). The Court of Appeals for the Ninth Circuit sustained the judgment as to count 3 of indictment No. 20069, as to which Smiley seeks review in No. 124, but reversed the judgment as to the other two counts, holding that the evidence was not sufficient to prove that Smiley had affirmatively represented himself to be a United States citizen (R. 296, 289-290).

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[2] Count 2 of indictment No. 20069 charged the same offense as indictment No. 20604 and was dismissed on the Government's motion at the end of the trial (R. 213, 267). Count 4 of the former indictment was a perjury charge and was dismissed on Smiley's motion prior to trial (R. 2, 6, 10).

The evidence in respect of the latter counts may be summarized as follows:

Count 1 of Indictment No. 20069. On June 21, 1947, while Smiley was being booked as a material witness to a murder, Thomas A. Cox, a desk clerk of the Beverly Hills Police Department (R. 114), prepared an arrest report incorporating Smiley's answers to the questions on the report form (R. 116-118, 158). The pertinent questions (in italics) and Smiley's answers as recorded (in quotation marks) were as follows (R. 118): *Descent.* "Jewish." *Nationality.* "American." *Where Born.* "New York, New York." *Date Born.* "1/10/08." *Time in County.* "20 Yrs." *State.* "20 Yrs." *U. S. A.* "Life."

Indictment No. 20604. On November 1, 1945, Smiley was booked by Orville E. Harper, a Los Angeles City policeman (R. 99), on a gambling charge (R. 101). In the course of the booking process, Harper asked Smiley a series of questions from, and typed Smiley's answers on, Los Angeles City Police Department Form 5.5, denominated "Identification Report," which Smiley then signed (R. 96-97, 101-102, 111-112). The pertinent questions (in italics) and answers (in quotation marks) were as follows: *Citizen* "Yes." *Time in County* "20 Yrs." *State* "20 Yrs." *U. S. A.* "38 Yrs." *Age* "38." (R. 101, 107-108; Exhibit 9, R. 113.) In connection with the preparation of another form incident to the arrest, Harper asked Smiley where

he was born, to which Smiley replied, "New York" (R. 106).

In addition, there was testimony that the Los Angeles City Police Department collected statistical information from persons taken into custody for purely police purposes (R. 145); that Form 5.5, an adjunct of that department's fingerprint card, is prepared for the future identification of a person arrested (R. 97); that the department makes information on arrests available to other law-enforcement agencies, including the Immigration and Naturalization Service (R. 97-98); that the Federal Bureau of Investigation is automatically supplied with fingerprint cards and information as to charges against persons taken into custody by the department (R. 145); and that it is, and was at the time of the arrest involved in this count, the practice of the department to inform the Immigration Service of the arrest of a known alien (R. 144, 146).

Evidence pertinent to both charges. Richard B. Hood, special agent in charge of the Los Angeles office of the Federal Bureau of Investigation, testified that information obtained from fingerprint cards furnished the Bureau by law enforcement agencies may be employed in the preparation of identification orders; that such information may be made available to other law enforcement agencies, or may be used by the Bureau itself in the apprehension of fugitives; that information as to

a fugitive's nationality may be of tremendous value to an investigating officer; that information in the files of the Bureau is made available to the Immigration and Naturalization Service; and that the Bureau notifies the Service when an alien is sentenced for a crime (R. 137-140).

REASONS FOR GRANTING THE WRIT

1. The three counts on which respondent was convicted in the district court involve the same offense, i. e., false representation of citizenship of the United States, in violation of Section 346(a) (18) of the Nationality Act of 1940. The affirmance of one of these counts by the Court of Appeals is the basis of respondent's petition for certiorari in No. 124, which contends mainly that respondent's statements do not fall within the statute. For the reasons set forth in our brief in opposition, the Government is of the view that the petition in No. 124 raises no questions warranting review by this Court. If the Court should determine that the petition in No. 124 should be denied, this conditional cross-petition, involving the two counts reversed by the court below, need not be considered. It is filed solely to protect the Government's interests in the event that certiorari should be granted in No. 124. In that event it would be appropriate, in view of the interrelationship of the subject matter and questions presented by both petitions, for the Court to have the entire case before it.

2. The Court of Appeals' reversal of Smiley's conviction on count 1 of indictment No. 20069 and on the count contained in indictment No. 20604 was based solely on the ground that the statements upon which these counts were predicated did not constitute false representations of citizenship within the meaning of Section 346(a)(18) of the Nationality Act of 1940. As to the former count, the court stated that the only evidence to support Smiley's conviction consisted of his statements that he was born in this country and that he had lived here all his life, and that "A person may be born in the United States and remain therein for life and yet not be a citizen and while it may be that an officer, upon being informed by one whom he has under arrest that he, the party in custody, was born in the United States and had lived therein all his life, would conclude that the person whom he was interrogating was a citizen of the United States, it would be no more than a conclusion reached without the necessary supporting facts" (R. 290). As to the latter count, the court went further, holding in effect that nothing less than a specific, explicit statement that one is a citizen of this country falls within the purview of Section 346(a)(18). The court stated that Smiley's affirmative answer to the question whether he was a "citizen" on Form 5.5, even when taken together with his accompanying statement that he was born in New York, was not sufficient evidence to show

that he had falsely represented himself to be a *"citizen of the United States"* (R. 290-291).

The Government respectfully submits that the court below has placed an unwarranted restriction both on the scope of the statute and on the type of evidence required to support a conviction under it. On its face, Section 346(a)(18) precludes the construction that only express representations of citizenship are prohibited. The statute provides that no alien shall "falsely represent himself to be a citizen of the United States." It does not provide that the representation must follow the precise wording of the statute *in haec verba.* The term "represent" is generic, connoting every word, act, or failure to act sufficient to produce a conviction or belief on the part of another of the existence of a fact. It is defined in *Webster's New International Dictionary* (2d ed., unabridged, 1948) as meaning, first, "To bring clearly before the mind; to cause to be known, felt, or apprehended; to present; * * *." Section 79 of the Criminal Code (35 Stat. 1088, 1103),[3] the precursor of Section 346(a)(18), was interpreted in a manner consistent with this definition in *Fotie* v. *United States,* 137 F. 2d 831 (C. A. 8). In that case the court said that representations of birth in West

[3] "* * * whoever, for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both."

Virginia in an application for registration as a voter "were, if false and made for a fraudulent purpose, sufficient to constitute a violation of the statute under which the indictment was brought" (137 F. 2d at 837). These representations were made beyond the period of limitations, but the court said also that the act of voting, which occurred within that period, could, in some circumstances, constitute a false representation of citizenship.[4] An earlier holding in the same case that the mere act of voting by an alien is not in any circumstances a misrepresentation of citizenship within the meaning of the statute was withdrawn as dictum and erroneous (*ibid.*), the holding being that in any event the evidence was insufficient to show that the defendant was an alien.

The District Court accordingly instructed the jury in this case "that to 'represent oneself' as a citizen, as set forth in the indictment, means to hold oneself forth as, and to affirmatively claim to be, a citizen of the United States" (R. 274-275) and that "you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women" (R. 278). We think that the jury were justified in concluding that Smiley falsely represented himself to be a United States citizen to Cox, as alleged in

[4] See also *United States* v. *Martinez*, 73 F. Supp. 403, 406 (M.D. Pa.).

count 1 of indictment No. 20069. Contrary to the assertion in the opinion below (R. 290), the conviction on this count was not supported merely by the evidence of Smiley's statements that he was born in the United States and had lived here all his life. In addition, he answered "American" to the question "Nationality" (see p. 5, *supra*). While the word "nationality" is sometimes used to denote ancestry, it is more often associated with allegiance and citizenship. See Sections 101 and 201 of the Nationality Act of 1940, as amended (54 Stat. 1137, 1138, 60 Stat. 721, 8 U. S. C. 501, 601); *United States* v. *Wong Kim Ark,* 169 U. S. 649, 655, 656-657, 693; *Weedin* v. *Chin Bow,* 274 U. S. 657, 660; *Brassert* v. *Biddle,* 148 F. 2d 134, 136 (C. A. 2). That respondent did not understand the word "nationality" as applying to ancestry is clear from his anwer "Jewish" to the question as to "Descent." In the circumstances of this case, the jury plainly had a right to conclude that respondent's representation that his "nationality" was "American" was equivalent to a claim of citizenship of the United States.

Similarly, the court below erred in its reversal as to indictment No. 20604. The question "Citizen" on Form 5.5 could only have been meant to refer to United States citizenship. It is unreasonable to assume that a person under arrest who is asked whether he is a citizen could possibly understand such a question as referring generally to

citizenship in some country, especially when he is also questioned concerning the place of his birth and the length of his residence in the United States. That there could have been no misunderstanding on this score is evidenced by defense counsel's virtual concession at the trial that the word "citizen" referred to United States citizenship (R. 163, 251).

In respect of both counts, it does violence to the common understanding of the words used to conclude that Smiley did not represent to the respective agencies that he was a citizen of the United States.

CONCLUSION

For the reasons stated, and on the condition suggested above (pp. 1-2), it is respectfully submitted that this cross-petition for a writ of certiorari should be granted.

ARNOLD RAUM,
Acting Solicitor General.

JULY 1950.

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